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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United States Pollution Control, Inc.

File: B-225372

Date: January 29, 1987

DIGEST

1. In reprocurement for services after default by the original contractor, it was reasonable for the contracting officer to consider proposal from an offeror who had not participated in the original two-step procurement, in addition to proposals from offerors who already had been found technically acceptable in connection with original procurement, since a contracting officer is authorized to use any terms and acquisition method deemed appropriate for a repurchase, and considering the new offeror contributed to maximizing competition and repurchasing at as reasonable a price as practicable.

2. In reprocurement after default, it was reasonable for the contracting officer to hold discussions only with offeror who had not participated in original procurement, since discussions were necessary to determine technical acceptability of the new offeror's proposal and did not prejudice other offerors whose proposals already had been found technically acceptable in connection with original procurement.

3. Contracting agency conducting reprocurement after default does not engage in technical leveling--improper coaching of an offeror in successive rounds of discussions--merely by holding discussions with offeror to determine technical acceptability of its proposal, which had not been considered under original procurement.

4. Challenge to agency's decision in reprocurement after default to request best and final offers, without discussions, from offerors whose proposals already had been found technically acceptable in connection with original procurement, is untimely when not raised before due date for best and final offers.

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5. Contention that notice of reprocurement was required to be published in Commerce Business Daily is without merit since reprocurements are not strictly subject to publication requirements applicable to regular procurements and, in any event, protester was not prejudiced by failure to publish synopsis since it had actual notice of and participated in the reprocurement.

DECISION

United States Pollution Control, Inc. (USPCI) protests the award of a contract to Underwood Industries, Inc. under request for proposals (RFP) No. DLA200-86-R-0082 issued by the Defense Logistics Agency (DLA) to reprocure hazardous waste disposal services after default by the original contractor. USPCI's principal contention is that DLA should not have considered Underwood's proposal under the RFP because Underwood had not participated in the original procurement. We deny the protest in part and dismiss it in part.

On April 3, 1986, DLA awarded a requirements contract to Envirosystems Corporation for hazardous waste disposal services for the Defense Reutilization and Marketing Office in Jacksonville, Florida and the surrounding area. The base period of the contract was for 1 year from the date of award, with an option to extend for 3 months. The procurement was conducted using two-step sealed bidding procedures as provided in Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 14.5 (1986). Under step one of the solicitation, DLA received a total of six acceptable technical proposals from four offerors, Envirosystems, Chemical Waste Management, USPCI, and Suffolk Services, Inc. (which submitted three alternate proposals). A technical proposal submitted by Underwood Industries was not received by DLA until after the due date for proposals and therefore was not considered. The four offerors found technically acceptable then submitted bids under step two of the solicitation, and award subsequently was made to Envirosystems as the lowest responsive, responsible bidder.

On August 19, Envirosystem's contract was terminated for default. According to DLA, the waste disposal services were urgently needed after the contract termination because storage capacity at pickup locations had been exceeded; several locations were in violation of Environmental Protection Agency storage permits; and there were potential leaks of materials due to deterioration of containers caused by weather and storage conditions. To reprocure the services, the contracting officer issued a new RFP covering

the same locations and performance period as the original contract.[1]/

The reprocurement was not synopsized in the Commerce Business Daily (CBD); instead, in order to expedite the reprocurement, the contracting officer sent the RFP to USPCI and Chemical Waste Management, the second and third lowest bidders under the second step of the original solicitation.[2]/ DLA advised USPCI and Chemical Waste Management to submit only price proposals by September 3, since DLA planned to incorporate their technical proposals under step one of the original solicitation into their proposals under the new RFP. On September 2, Underwood Industries, whose technical proposal under the original solicitation was not considered because it was received late, notified the contracting officer of its intention to submit a proposal under the new RFP. On September 3, Underwood submitted both technical and price proposals; USPCI and Chemical Waste Management submitted price proposals only, as directed by DLA.

DLA then held discussions with Underwood and concluded that its proposal was technically acceptable. On September 12, all three offerors were advised to submit best and final offers by September 19. The initial and final price proposals received were as follows:

	Initial	Final
Underwood	$ 855,150	$ 887,350
USPCI	1,268,666	1,218,796
Chemical Waste	1,675,511	1,621,686

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[1]/ Specifically, the base period under the new RFP ran through April 2, 1987, the remaining term under the original contract, with an option to extend for 3 months.

[2]/ According to DLA, the new RFP was not sent to the other offeror found technically acceptable under the original RFP, Suffolk Services, due to uncertainty concerning the firm's responsibility and because the contracting officer did not consider Suffolk's prices under the prior solicitation to be competitive.

Award was made to Underwood on September 25. UPSCI then filed its protest with our Office on October 14.3/

USPCI's principal contention is that DLA should not have considered Underwood's proposal in connection with the reprocurement because the proposal had not already been evaluated and found technically acceptable under the original solicitation. USPCI also argues that (1) DLA was prohibited from conducting discussions with Underwood by a standard clause included in the new RFP which provided that bids would be evaluated without discussions, and (2) DLA engaged in technical leveling by conducting discussions with Underwood regarding the technical acceptability of its proposal. We find these arguments to be without merit.

Underlying USPCI's specific arguments is its general contention that the reprocurement constituted a new acquisition and thus was subject to the general FAR provisions applicable to regular procurements. We disagree. Contrary to USPCI's argument, DLA's issuance of the new solicitation does not convert the reprocurement into a new acquisition fully subject to the FAR. Rather, since DLA was repurchasing the same services for the same locations and time period covered by the original solicitation, the new RFP constituted a reprocurement after default as defined in FAR, 48 C.F.R. § 49.402-6.

Although we review reprocurements to determine if the contracting agency acted reasonably, the statutes and regulations governing regular procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. Rather, the contracting officer may, as authorized by the standard default clause, use any terms and acquisition method deemed appropriate for the repurchase, provided that competition is obtained to the maximum extent practicable and the repurchase is at as reasonable a price as practicable.

3/ Because the agency received notice of the protest more than 10 days after award was made, DLA was not required to suspend performance under the contract. Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(1) (Supp. III 1985). USPCI maintains that it was not notified of the award in time to invoke the suspension provision; DLA disagrees, stating that USPCI was orally advised on September 26 that award had been made on September 25. In any event, the applicability of the statutory suspension is determined by reference to the date of award, not the date the protester received notice of the award.

FAR, 48 C.F.R. § 49.402-6(a) and (b). In this case, we find that it was reasonable for the contracting officer to consider the Underwood proposal in connection with the reprocurement, since doing so served both goals established by the FAR: maximizing competition, by increasing the number of offers considered, and repurchasing at the lowest practicable price, since Underwood's price was significantly lower than both USPCI's and Chemical Waste Management's prices. TSCO, Inc., supra.

Similarly, we see no basis to object to the contracting officer's decision to hold discussions with Underwood regarding its technical proposal. Limiting discussions to Underwood did not represent unequal treatment of the other two offerors, as USPCI contends, since the discussions were held only to determine Underwood's technical acceptability, a determination already made with regard to USPCI and Chemical Waste Management in connection with the original solicitation.

As USPCI states, the new RFP incorporated by reference FAR, 48 C.F.R. § 52.214-10, the standard clause providing for evaluation of bids without discussions. That clause, which applies only to invitations for bids, see FAR, 48 C.F.R. § 14.201-6(e)(2), was included in the original step two solicitation calling for sealed bids from the offerors found technically acceptable under step one. Since the RFP subsequently issued for the reprocurement in effect duplicated the original step two solicitation, it also inadvertently incorporated that clause by reference. Despite the inclusion of the clause, the solicitation was denominated an RFP and the reprocurement conducted in accordance with the rules governing the solicitation of competitive proposals, which provide for discussions with offerors. 10 U.S.C. § 2305(b)(4)(A) (Supp. III 1985). Consequently, once the contracting officer decided to consider the Underwood proposal, it was reasonable to hold discussions with Underwood also, since discussions were necessary to determine Underwood's technical acceptability and did not prejudice USPCI, whose proposal had already been found technically acceptable.

Further, there is no merit to USPCI's contention that the discussions with Underwood constituted technical leveling, which is defined as helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing a proposal. FAR, 48 C.F.R. § 15.610(d)(1); Raytheon Ocean Systems Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134. Here, not only were there no successive rounds of discussions, but there is no indication that DLA improperly coached Underwood in any way.

USPCI also contends that DLA created an improper auction among the offerors by requesting best and final offers from USPCI and Chemical Waste Management even though no technical deficiencies were identified in their proposals. This issue is untimely since it was not raised before September 19, the date best and final offers were due. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986); Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524. In any event, even in regular negotiated procurements where discussions are held, it is not improper for the contracting agency to request best and final offers, without discussions, from those offerors whose proposals have no technical deficiencies. Weinschel Engineering Co., Inc., 64 Comp. Gen. 525 (1985), 85-1 CPD ¶ 574.

Finally, USPCI challenges DLA's failure to publish a notice of the reprocurement in the CBD. As discussed above, the publication requirements associated with regular procurements are not directly applicable to reprocurements after default. In any event, USPCI was not prejudiced by the failure to publish a CBD notice since it had actual notice of the reprocurement upon receipt of the new RFP.

USPCI requests that it be allowed to recover its proposal preparation costs and the costs of filing and pursuing the protest. Since we find the protest to be without merit, we deny the request for costs. 4 C.F.R. § 21.6(d), (e).

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel